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88-235

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

BARRY M. WOLFE,

Petitioner

v.

JOHN O. MARSH, JR., Secretary of the Army and the United States of America,

Respondents

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the District of Columbia Circuit

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QUESTION PRESENTED

Where the jurisdiction of the United States District Court for the District of Columbia was based, in part, on Section 1346(a)(2) of Title 28 U.S. Code, was jurisdiction on appeal properly in the United States Court of Appeals for the District of Columbia where it was exercised or in the United States Court of Appeals for the Federal Circuit where Petitioner requested the Appeal be transferred?

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OPINIONS BELOW

The opinions of the Court of Appeals for the District of Columbia are reported at 835 F.2d 354 (D.C. Cir. 1987) and 846 F.2d 782 (D.C. Cir. 1988).

The latter opinion denies Petitioner's Motion for Reconsideration and Transfer. The earlier opinion of the Court of Appeals affirms the decision of the United States District Court in this case. The decisions of the United States District Court dated December 26, 1985 and September 30, 1986, reported as Slip Opinions, dismissed Petitioner's complaint but specifically found that the United States District Court had jurisdiction over Petitioner's monetary claims under the Little Tucker Act because Petitioner had expressly waived any claim for damages in excess of $9,999.99. Copies of the decisions are

found in the Appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals for the District of Columbia was dated and entered December 18, 1987, 835 F.2d 354 (D.C. Cir. 1988). A timely Motion for Reconsideration and Transfer filed December 31, 1987 was denied May 13, 1988, 846 F.2d 782 (D.C. Cir. 1988). This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 127(a) of the Federal Courts Improvement Act of 1982, 28 U.S.C. 1295(a), provides in pertinent part:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction -

* * * * *

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an

> Act of Congress or a regulation of an executive department providing for internal revenue shall be governed bysections 1291, 1292, and 1294 of this title * * *.

Section 129(a) of the Federal Courts Improvement Act of 1982, 28 U.S.C. 1346(a), provides in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress * * *.

STATEMENT OF THE CASE

On April 4, 1985, Petitioner brought suit in the United States District Court for the District of Columbia against John O. Marsh, Jr., Secretary of the Army and the United States. The complaint, set forth in the Appendix pages 74A-84A, includes the following:

JURISDICTION

1. This action arises under the laws of the United States including: 10 U.S.C. 1552, the implementing regulations of the United States Department of the Army. This action is for, among other things, mandatory injunctive relief in the nature of mandamus over which this Court

> has subject matter jurisdiction pursuant to 28 U.S.C. 1361; and further, this Court has jurisdiction under 28 U.S.C. Sections 1331, 1343(3), 1346(a)(2), 2201, 2202, and 3 U.S.C. 702.

The gist of Petitioner's complaint was that he was wrongfully discharged from the United States Army and that the Army Board for Correction of Military Records acted improperly in denying his application for correction of his military records.

Petitioner specifically asked in his complaint the United States District Court render judgment and declare that his discharge from the United States Army was unlawful and not in accordance with established regulations, direct that defendants change his military records to

reflect (1) reinstatement of active duty, (2) award him the grade of E-6 to which he would have been promoted had he not been unlawfully discharged from active duty, and (3) grant him such other further, alternate or equitable relief as he might be entitled to receive including, cost and attorney's fees and as may be just and proper.

Reinstatement and/or finding a discharge from the military illegal inherently includes payment of back pay. O'Hanlon v. United States, 11 Cl. CT. 192, 198 (1986).

Subsequently, the government raised the issue of the Plaintiff's potential monetary recovery of being $10,000 or more over which the United States District Court did not have jurisdiction. Petitioner then expressly waived any claim for damages in excess of $9,999.99.

The United States District Court in considering its jurisdiction under 28 U.S.C. 1346(a)(2) ruled as follows:

> "[T]his Court has jurisdiction over Plaintiff's monetary claims under the Tucker Act because Plaintiff has expressly waived any claims for damages in excess of $9,999.99."

Subsequently, on November 28, 1986, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit. On December 18, 1987, a panel of that court affirmed the District Court's judgment.

On December 31, 1987, Petitioner moved for reconsideration and transfer of the case to the United States District Court for the Federal Circuit. On May 13, 1988, the Court of Appeals denied

that motion.

At no point throughout the course of the Appeal until Petitioner filed his Motion for Reconsideration and Transfer on December 31, 1987 did any of the parties suggest that the Court of Appeals lacked jurisdiction to hear the appeal, nor did that Court raise the issue.

This Petition for Writ of Certiorari challenges only the jurisdiction of the United States Court of Appeals for the District of Columbia without in any sense waiving Petitioner's right to raise arguments on the merits and the law otherwise before the United States Court of Appeals for the Federal Circuit.

REASON FOR GRANTING WRIT

Under Section 127(a) of the Federal Courts Approvement Act of 1982, 28 U.S.C. 1295(a), Petitioner should have appealed

to the Federal Circuit rather than the District of Columbia Circuit.

Upon appealing the case, however, the United States Court of Appeals for the District of Columbia should have found that it was without jurisdiction and should have, in the interest of justice, transferred the Appeal to the United States Court of Appeals Federal Circuit under 28 U.S.C. 1631.

The failure of the parties and the Court of Appeals for the District of Columbia to take notice of the jurisdictional issue in this case seems obviously inadvertent. Nevertheless, that circumstance cannot vest jurisdiction in a Court not having jurisdiction.

This Court in a similar case, Ballam v. United States, 474 US 1078, 106 S. Ct. 844, 88 L. Ed. 2d 886 (1986) granted the

Writ for Certiorari, vacated judgment and remanded the case to the United States Court of Appeals for the District of Columbia to transfer the case pursuant to 28 U.S.C. 1631 to the United States Court of Appeals for Federal Circuit.

CONCLUSION

For the reasons stated this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BARRY W. WOLFE,

Appellant,

v. Appeal No. 86-5703

JOHN O. MARSH, Jr., Secretary of the Army, et al.

Appellee.

DECIDED: December 18, 1987

Before BUCKLEY and WILLIAMS, Circuit Judges, and AUBREY E. ROBINSON, Jr.,* Chief Judge, United States District Court for the District of Columbia.

* Sitting by designation pursuant to 28 U.S.C. 292(a)

Opinion for the Court filed by Chief Judge AUBREY E. ROBINSON, Jr.

AUBREY E. ROBINSON, Jr., Chief Judge:

In this case, Appellant, Barry W. Wolfe ("Wolfe") appeals from the District Court's grant of summary judgment in favor of Appellees, John O. Marsh, Jr., Secretary of the Department of the Army, and the United States of America ("the Army"), denial of Wolfe's cross-motion, and dismissal of the complaint. Wolfe's complaint, alleging various procedural defects in the handling of his discharge from the Army, requested the District Court to reverse administrative action denying his request to have his discharge upgraded. The District Court found, under the arbitrary, capricious or

contrary to law standard of review, that there was no basis for affording Wolfe the relief he sought. We affirm.

I.

After slightly over eight years of service in the United States Army, on July 24, 1979, Wolfe was administratively discharged in lieu of court-martial under other than honorable conditions pursuant to Army Regulation ("AR") 635-200, chapter 10 ("chapter 10 discharge"). The court-martial charges which precipitated the chapter 10 discharge were predicated upon a finding by the Army Criminal Investigation Command that Wolfe had participated in several drug transactions while assigned to Fort Belvoir, Virginia, as an army cook. To prepare for the pending court-martial proceedings, Wolfe obtained the assistance of Captain William P. Boyer, a certified military

lawyer. Captain Boyer unsuccessfully attempted to obtain immunity for Wolfe, in return for information Wolfe might provide regarding other drug transactions. After this unsuccessful attempt, and faced with the possibility of punitive sanctions and a bad conduct discharge resulting from the court-martial charges, Wolfe sought a chapter 10 discharge.

In July 1979, to initiate chapter 10 discharge procedures, Wolfe submitted a form reciting the grounds for his request and his appreciation of the consequences of his action in requesting the discharge. In summary, the form stated: his request was voluntary; he was guilty of the charges against him or of lesser included offenses authorizing the imposition of a Bad Conduct or Dishonorable Discharge; he did not desire

rehabilitation, for he had no desire to perform further military service; he had consulted with an attorney who had advised him of his rights; and he understood the adverse consequences of his request, including that if it was accepted he could be discharged under other than honorable conditions.1

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1 Provision four (4) of the form submitted by Wolfe states:
I understand that, if my request for discharge is accepted, I may be discharged under other than honorable conditions and furnished an Under Other Than Honorable onditions [sic] Discharge Certificate. I have been advised and understand the possible effects of an Under Other Than Honorable Conditions Discharge and that, as a result of the issuance of such a discharge, I will be deprived of many or all Army benefits, that I may be ineligible for many or all benefits administered by the Veterans Administration, and that I may be deprived of my rights and benefits as a veteran under both Federal and State law. I also understand that I may expect to encounter substantial prejudice in civilian life because of an Under Other Than Honorable Conditions Discharge.
Request for Discharge for the Good of the Service, reprinted in Appellant's

Shortly thereafter, still in July 1979, Wolfe's request was approved by the officer exercising general court-martial jurisdiction for the base at which Wolfe was stationed, Major General Kelly, the appropriate Army official to finally approve the chapter 10 discharge request. Predictably, he was discharged under other than honorable conditions. Wolfe, however, soon had second thoughts, and he petitioned the Army Discharge Review Board requesting it to upgrade his discharge to honorable. The Review Board denied Wolfe's request, rejecting his attack on the underlying court-martial charges and finding that the procedural defects complained of did not prejudice Wolfe. The Review Board also considered, and rejected as grounds for relief,

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Appendix 52,54.

mitigating factors surrounding his request indicating that Wolfe was suffering from personal problems at the time he submitted his request and that he was erroneously advised, by a congressional aide, that his discharge could routinely be upgraded.

Wolfe then sought relief from the Army Board for the Correction of Military Records ("Correction Board"). The Correction Board also denied his request to upgrade his discharge to honorable, finding that, under all the circumstances of the case, Wolfe's discharge was appropriate and "was accomplished in compliance with applicable regulations with no indication of procedural errors which would tend to significantly jeopardize [Wolfe's] rights." Findings of the Army Board for the Correction of Military Records at 5, reprinted in

Appellant's Appendix 24, 28.

Following the Correction Board's disposition, Wolfe sought judicial review. The District court granted summary judgment in favor of the Army and dismissed Wolfe's complaint, holding that the Correction Board's decision that the procedural irregularities were not prejudicial and thus that the discharge was proper was not arbitrary, capricious or contrary to law.

Throughout the administrative and judicial proceedings Wolfe has pointed to several procedural irregularities in the handling of his discharge request as entitling him to relief. Generally they relate to missing documentation in his case file, the conducting of his physical examination after his discharge request was approved rather than before, and the absence of proof that his discharge

request was formally reviewed by intermediate commanding officers prior to final approval.2 On appeal the focus has been on the requirement that intermediate commanding officer's review and make recommendations regarding the discharge request prior to final approval. AR 635-200, ¶10-3. Because this is the only arguable basis for relief in this Court, we limit our discussion accordingly.3

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2 The Army Discharge Review Board found that Wolfe's unit commander and intermediate commander (referred to collectively as intermediate commanders in this opinion) did not take action on Wolfe's request prior to final approval. The Correction Board did not make a specific finding on this issue. For the purposes of this appeal, we assume that the Correction Board adopted this finding.

3 Indeed, to the extent Wolfe still claims that the missing documents and the timing of his physical examination provide independent bases for relief, apart from their possible effect on the reviewing function of the intermediate commanders, these claims are plainly without merit and hardly merit further discussion beyond what was provided in

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the proceedings below. For example, Wolfe continues to attach significance to the absence from his file of the charge sheet indicating he was subject to court-martial proceedings. This is frivolous. There has never been any doubt that charges were preferred against Wolfe at the time he sought the chapter 10 discharge. The chapter 10 discharge request form signed by Wolfe acknowledged that charges were preferred against Wolfe, and Wolfe's counsel conceded at oral argument that charges were indeed pending against Wolfe at the time he sought the chapter 10 discharge. Under these circumstances, the fact that the charge sheet was missing from his file when Wolfe sought administrative relief cannot procide a basis for relief.

Similarly, the record amply demonstrates that the timing of the physical examination does not provide a basis for relief. The final examination found him fit for discharge, and the Correction Board, on sufficent evidence, concluded that Wolfe had not suffered from any significant health problems prior to his discharge. Under these circumstances, Wolfe's claim that the intermediate commanders may have recommended a medical discharge had they access to a medical report not yet in existence is fanciful, and rejection of this claim by the Correction Board was not arbitrary or capricious. And, of course, the timing of the physical examination does not provide any independent basis for relief.

II.

The regulation at issue clearly contemplates input from intermediate commanders prior to final approval by the commander exercising general court-martial jurisdiction. It provides:

> The request for discharge will be forwarded through channels to the office who has general court-martial jurisdiction over the member concerned. Commanders through whom the

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Finally, to the extent Wolfe still seeks reversal of the substantive decision to discharge him under other than honorable conditions, we find this claim without merit. The decision regarding the type of discharge to issue under chapter 10, involving as it does considerations of morale, discipline and fitness for military service, is one within the primary competence of the military. We cannot, given the seriousness of the charges preferred against Wolfe, find that the substantive decision to discharge Wolfe under other than honorable conditions is arbitrary and capricious.

> request for discharge is forwarded will recommend either approval or disapproval with the reasons for the recommendation; if approval is recommended, the type of discharge to be issued also will be recommended.

AR 635-200, ¶10-3(b).

After stating the general rule that an under other than honorable discharge is normally appropriate for a member who is discharged pursuant to chapter 10, the regulations provide than an honorable or general discharge may instead be ordered if the member's overall record merits either of these dispositions. AR 635-200, ¶10-8. Although the regulations contemplate input from intermediate commanders, the regulations unequivocally repose final decisionmaking authority in

the commanding officer exercising general court-martial authority. This officer is in no way bound to accept recommendations, either favorable or unfavorable to the member, made by intermediate commanders. His duty is to consider the member's potential for rehabilitation and to review his entire record before approving or disapproving the discharge request. AR 635-200, ¶10-4. The "entire record," presumably, includes any recommendations made by intermediate commanding officers.

The essence of Wolfe's claim is that favorable input from the intermediate commanders might have resulted in the issuance of an honorable or general discharge; the absence of the intermediate commanders' recommendations for the final decisionmaker's consideration assertedly vitiates the

purpose of these required recommendations--to insure fully informed discharge dispositions--and constitutes a per se violation of Wolfe's rights requiring that the final approval be invalidated. Careful review of the Correction Board's function and of the Courts' duty to insure that the Correction Board faithfully and responsibly performs that function, however, compels us to reject Wolfe's claim.

III.

The Correction Board is vested with broad authority to "correct any military record...when [it] considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552 (1982). Although this power is a discretionary one, the Correction Board is not without guidance. The Correction Board is not

without guidance. The Correction Board can only exercise its discretion for the benefit of the individual member. Doyle v. United States, 599 F.2d 984, 1000, 220 Ct.Cl. 285, modified, 609 F.2d 990, 220 Ct.Cl. 326 (1979), cert. denied, 446 U.S. 982, 100 S.Ct. 2961, 64 L.Ed. 2d 837 (1980). And the Correction Board's failure to so exercise its discretion, when properly called upon to do so, is subject to judicial review for arbitrariness and capriciousness. Dilley v. Alexander, 603 F.2d 914 (D.C.Cir.1979). It is apparent, then, that the Correction Board, and not the Courts, is the primary protector of individual members' rights against military overreaching.4

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4 This is not as anomalous as it may initially appear. The Correction Board is a civilian board. The composition of the Correction Board and

Wolfe places primary reliance on Dilley v. Alexander, 603 F.2d 914 (D.C.Cir.1979). In Dilley, Army Reserve officers were involuntarily released from active duty because they were not selected for temporary promotion by two successive promotion selection boards. Id. at 916. The first promotion board to "pass over" the Army Reserve officers did not include any Reserve officers, in violation of a statutory directive requiring Reserve officer representation on promotion selection boards convened to consider the promotion of Reserve officers. Id. at 920. To remedy this defect, the Army convened Relook Boards

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the availability of judicial review insures that individual rights will not be unduly trampled upon in the name of military efficiency, while effectuating the considered judgment that undue judicial interference with military operations must be avoided.

to reconsider the candidates for promotion, using the same data and criteria considered by the illegally constituted promotion selection boards. Before the Relook Boards performed this function, a properly constituted promotion selection bassed over for promotion the Army Reserve officers in question. Id. at 919.5 The Relook Boards subsequently recommended that these Reserve officer not be promoted. Id. The Correction Board then concluded, that the Relook Board's recommendation of nonpromotion established that the absence of Reserve officers from the first board did not prejudice the passed over Reserve

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5 Although the second promotion board was properly constituted, it had before it the illegally constituted promotion selection board's recommendation not to promote the Reserve officers in question, significantly decreasing their chances for promotion by the second board. 603 F.2d at 924 & n.21.

officers, and thus, having been twice passed over for promotion, they had to be involuntarily released from active duty. Id.

The Court rejected the Correction Board's approach as contrary to law. Id. at 925. The Correction Board had sought to detect the absence of what Congress had determined to be virtually and inherently undetectable: specific prejudical effect from institutionalized bias. See Doyle v. United States, 599 F.2d 984, 996-998, 220 Ct.Cl. 285 (1979). Given the nature of the problem presented by institutionalized bias, Congress had devised an institutional remedy. The Correction Board was not free to disregard this remedy in favor of a fact-specific inquiry into whether anti-Reserve bias existed in fact in the particular case presented to it. Dilley,

603 F.2d at 922-24.

Given the intractable nature of institutionalized bias, it is not surprising that the Dilley court forcefully rejected the Army's attempt to dilute the institutional remedy devised by Congress. However, the court's declaration that consideration by a properly constituted promotion board was a "procedural entitlement" of Reserve officers, id. at 923-24, which the Army could not circumvent through alternative procedures purportedly designed to detect actual prejudice, was intended to do no more than perform the task at hand: protect the integrity of the institutional remedy designed by Congress to ameliorate institutional bias. Any extension of Dilley beyond this context

is unwarranted.6

There is nothing in Dilley that can be construed, by any stretch of imagination, as signalling the adoption of a per se rule invalidating Correction Board action when it chooses not to correct a military record that follows procedures containing defect. Similarly, Dilley cannot be construed as altering the relationship

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6 This discussion is not intended to imply that congressional action is a prerequisite to the application of Dilley. Rather, it is to emphasize that it is the structural character of a particular procedural device designed to counter generic bias which is all-important, and which the Correction Board must honor. Indeed, Dilley found itself consistent with prior case law requiring strict adherence to regulations dictating the composition of military boards empowered to take or recommend personnel actions. 603 F.2d at 922 n. 15 (citing Henderson v. United States, 175 Ct.Cl. 690 (1966), cert. denied, 386 U.S. 1016, 87 S.Ct. 1373, 18 L.Ed.2d 455 (1967)). We do not, by our discussion here, intend to cast doubt on the continued vitality of Henderson v. United States, to the extent it is consistent with Dilley and this opinion.

between the Correction Board and the Courts. A Correction Board's determination that a procedural defect did not prejudice a member, and thus does not require it "to correct an error or remove an injustice," will be overturned only if such determination is arbitrary, capricious or contrary to law.

Even cursory examination of Wolfe's claim reveals that it does not fall within Dilley. Wolfe does not contend that the decision to discharge him under other than honorable conditions was made by an improperly constituted entity, nor could he. Final decisionmaking authority was vested in and exercised by, not a board carefully tailored to resist, or at least take into account, institutional or generic basis, but a single individual

officer.7 And it is undisputed that the proper individual officer made the final decision. Thus, this is not a challenge to the legal authority of the final decisionmaker qua final decisionmaker, as was the claim in Dilley; instead, Wolfe's claim goes to the sufficiency of the date base relied upon by the final decisionmaker.

Viewing the complaint in this light, we cannot find that the Correction Board's determination that the procedural irregularities complained of did not

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7 Thus, comparing the input required of intermediate commanders here with the input required of Reserve officers by the statute under consideration in Dilley, is superficial and ultimately unsatisfying. The Reserve officers' absent input would have been that of co-equal members of the body vested with final decisionmaking authority. Here, the absent input would have been from subordinate officers to the one with final decisionmaking authority, who is free to accept or reject their recommendations.

require it "to correct an error or remove an injustice" was arbitrary and capricious. Although Major General Kelly did not have the intermediate commanders' recommendations on Wolfe's discharge request, he had a fair indication of their views: their recommendations to try the serious drug charges court-martial. Furthermore, Major General Kelly granted Wolfe a personal audience for about an hour before he approved the discharge request, a courtesy not required by the regulations and which allowed Wolfe to argue that his otherwise fine record merited favorable treatment. In sum, the omissions from the data base upon which Major General Kelly made his decision seem far less prejudicial than faulty data bases upon which other important military personnel decisions have been made, decisions which have

survived judicial review.8 See, e.g., Knehans v. Alexander, 566 F.2d 312 (D.C.Cir.1977)(Selection Board wrongfully considered adverse reports and failed to consider several complimentary letters of commendation in recommending nonpromotion, leading to officer's involuntary discharge; Correction Board's decision not to take corrective action upheld), cert. denied, 435 U.S. 955, 98 S.Ct. 1646, 56 L.Ed.2d 83 (1978).

IV.

All other claims for relief, including but not limited to Wolfe's claim that procedural defects in the handling and reviewing of his discharge amount to a deprivation of dur process, have been reviewed and found to be

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8 Thus, any claim that the unavailability of documents for Major General Kelly's personal review warrants relief is denied.

without merit.

CONCLUSION

Summary judgment in favor of the Army was proper. The Correction Board's decision not to take corrective action was not arbitrary, capricious or contrary to law. This holding should not be construed as an endorsement of the manner in which Wolfe's discharge request was processed by the field commanders. It is not our function to police these individuals and require that all of their personnel actions be taken in strict compliance with Army regulations. Today's holding simply adheres to long-standing precedent recognizing that Congress vested primary oversight and remedial responsibilities in this area in the Correction Board. See Knehans v. Alexander, 566 F.2d 312, 315 (D.C.Cir.1977). Because we are satisfied

that the Correction Board acted within the broad mandate of 10 U.S.C. 1552 when it declined to take corrective action, we uphold its determination and affirm the District Court.

It is so ordered.

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

BARRY W. WOLFE,

Appellant,

v. Appeal No. 86-5703

JOHN O. MARSH, JR., Secretary of the Army, et al,

Appellee.

DECIDED: May 13, 1988

Before BUCKLEY and WILLIAMS, Circuit Judges, and AUBREY E. ROBINSON, Jr.,* Chief Judge, United States District Court for the District of Columbia.

*Sitting by designation pursuant to 28 U.S.C. 292(a).

PER CURIAM:

After our decision on the merits in this case, 835 F.2d 354 (D.C.Cir.1987), appellant filed a Motion for Reconsideration and Transfer. For the reasons set forth below, we deny the motion.

Appellant rests his motion on a provision of the Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(2)(1982), which states that the Federal Circuit has exclusive jurisdiction of appeals from final decisions of a district court "if the jurisdiction of that court was based, in whole or in part," on the Little Tucker Act, 28 U.S.C. § 1346(a)(2) (1982). 28 U.S.C. § 1295(a)(2). Wolfe claims that, because the district court purported to base its jurisdiction in part on the Little Tucker Act, we were without

jurisdiction to hear his appeal.1

In Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528 (D.C.Cir.1988), we held that, where a plaintiff seeking an upgrade neither seeks nor is granted monetary relief, the mere fact that a government payment of money is an automatic concomitant of the requested relief does not support Little Tucker Act jurisdiction. Vietnam Veterans, at 533-535.

Upon reading Wolfe's complaint, it appears that this case fits comfortably within the confines of Vietnam Veterans. In his complaint, Wolfe asked only for

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1 The government's response to Wolfe's motion appears to concede the issue. See Appellee's Response to Appellant's Motion for Reconsideration and for Transfer at 1-2. Because this response was filed prior to our decision in Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528 (D.C.Cir.1988), however, we are disinclined to accord it much weight.

"mandatory injunctive relief" declaring his dishonorable discharge unlawful and directing reinstatement and an upgrade, and "other further, alternate, or equitable relief" including costs and fees. Complaint at 1, 5-6. The complaint contained neither a claim for money damages nor a suggestion that the requested relief would entail such damages.

Subsequent memoranda contain hints that Wolfe may have intended to assert a claim for money damages, however. Because the record is unclear as to whether the district court (and the parties) were operating under the assumption that the collateral consequences of equitable relief implicate the Little Tucker Act, or whether Wolfe intended to assert a distinct claim for money damages, and the

district court discerned such an intent, we take this opportunity to sharpen the rule laid down in Vietnam Veterans.

The spectre of money damages was raised for the first time by the government in a motion for summary judgment on the grounds that the district court lacked Little Tucker Act jurisdiction over the case. The government suggested that Wolfe's requested injunctive relief would require an award of over $10,000 in back pay, and thus that jurisdiction was proper only in the court of claims. Specifically, in its memorandum supporting its motion, the government noted that "[i]mplicit in his request...is a request for the attendant back pay," which the government calculated to be in excess of $50,000. Government's Memorandum in Support of its Motion to Dismiss at 10 & n. 9.

The closest Wolfe came to putting forth a claim for money damages was in his Memorandum in Opposition to Defendant's Motion to Dismiss and in Support of Plaintiff's Cross-Motion for Summary Judgment ("Plaintiff's Memo"). In order to counter the government's argument that the collateral consequences of his requested relief would exceed $10,000, Wolfe calculated the back pay award which would accompany an upgrade at approximately $3,300, and waived any damages in excess of $10,000. Plaintiff's Memo at 6-7. The plaintiff then offered to file a specific waiver or to amend his complaint to show that he had waived back pay in excess of $10,000. There is no indication in the record that he did in fact amend his complaint in any way or file a waiver. Moreover, as far as we can tell, Wolfe offered only to

amend his complaint to waive any collateral money damages above $10,000, not to amend his complaint to add a specific claim for back pay.

Nevertheless, in its memorandum opinion denying the government's motion to dismiss, the district court, after holding that it had jurisdiction over plaintiff's equitable claims, relied on Wolfe's waiver of back pay in excess of $10,000 in holding that jurisdiction was proper under the Little Tucker Act. Wolfe v. Marsh, Civil No. 85-1073, slip op. at 3-4 (D.D.C. Dec. 26, 1985). To the extent the district court (and the parties) believed that the collateral consequences of the equitable remedy of reinstatement implicates the Little Tucker Act, Vietnam Veterans makes clear its error. Collateral consequences of equitable relief do not implicate the

Little Tucker Act, and therefore the district court did not in fact have jurisdiction under the Little Tucker Act, as the plaintiff had never made a claim of money damages, only a waiver of collateral relief in excess of $10,000.

It is possible that the district court read the complaint as requesting monetary relief. If so, it was in error. The plain terms of the complaint demanded only equitable relief. An award of the equitable relief requested--upgrade and reinstatement--would not encompass monetary relief. E.g., Ben-Shalom v. Secretary of the Army, 807 F.2d 982, 984-88 (Fed.Cir.1986) (noting that the Seventh Circuit had vacated the district court's award of back pay entered in contempt proceedings initiated because the Army had not complied with reinstatement order, rejecting the Army's

argument that the complaint implicitly sought back pay and transferring the appeal to the Seventh Circuit). And this court has already held that a general request that the district court award costs and all other relief deemed just and proper is irrelevant to the Little Tucker Act jurisdiction inquiry. Sharp v. Weinberger, 798 F.2d 1521, 1524 (D.C.Cir.1986). Thus it is clear Wolfe's complaint, by its own terms, did not seek monetary relief.

Moreover, we cannot say that Wolfe's subsequent memoranda cured the pleading defect. As it related to a complaint which did not request monetary relief, Wolfe's "waiver" is ambiguous at best; there was no monetary claim to waive. His offer to amend his complaint "to reflect the evidence of record," Plaintiff's Memo at 7, is likewise

ambiguous, especially at the pretrial motion stage of the proceedings. Conspicuously absent, in his specific offer to amend and in both memoranda submitted by plaintiff requesting summary judgment, is a request that the district court award him back pay.2

A claim for reinstatement is not a claim for monetary damages; and if a plaintiff seeks a court award of monetary damages in addition to reinstatement, he must say so in his complaint.3 The

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2 Parenthetically, we note that it is an extremely rare plaintiff who has trouble asking for money, if that is what he wants. This is especially true for plaintiffs represented by counsel, as was Wolfe.

3 There is no reason to read a complaint seeking solely equitable relief as also seeking monetary relief, even if the record reveals that the plaintiff expects that by obtaining equitable relief he will be entitled to receive back pay, which may or may not be the case. See Vietnam Veterans, at 535; Ben-Shalom, 807 F.2d at 984. In this area, a

plaintiff's interest in equitable relief may far exceed his interest in a back pay award, whether it be collateral to his injunctive relief or as a direct monetary judgment of the court. In fact, the record in this case indicates that this is such a case. Wolfe's back pay claim was relatively small, and his apparent aim throughout has been to upgrade his discharge so that he could reenlist. Indeed, during administrative proceedings before the Army Discharge Review Board ("ADRB"), his counsel specifically diavowed any interest in a monetary award, according to the ADRB Case Report: "Counsel pointed out that the applicant desires to return to the Army. Money is not a factor." ADRB Case Report and Directive at 9, reprinted in Exhibit I to Defendant's Motion to Dismiss at 14 (emphasis added). Throughout Wolfe's expressed desire has been to upgrade his discharge; indeed, according to the administrative record, Wolfe's only real complaint was that he thought he would get an honorable discharge, either originally or as a matter of routine upon request to have it upgraded. E.g., Application for Review of Discharge or Dismissal From the Armed Forces of the United States at 1, reprinted in Exhibit I to Defendant's Motion to Dismiss at 21; see also Wolfe v. Marsh, Civil No. 85-1073, slip op. at 12 (D.D.C. Dec. 26, 1985). We do not of course, intimate that these representations should be construed as a waiver of any back pay claim Wolfe may have had. But as Wolfe's

district court should not assume Little Tucker Act jurisdiction over implicit claims, cf. Ben-Shalom, 807 F.2d at 987 (rejecting the Army's argument that the Federal Circuit had jurisdiction because a claim for reinstatement implicitly seeks back pay), but only over explicit claims for monetary relief. This bright line rule is especially appropriate in the area of Little Tucker Act jurisdiction, as the basis of the district court's jurisdiction also controls the jurisdiction of the appellate court.

Therefore, even if Wolfe intended his waiver to be an affirmation of a distinct claim for monetary relief, we

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focus throughout has been on his equitable claims, it makes clear that Wolfe's "waiver" of an unstated monetary claim was inadequate to invoke Little Tucker Act jurisdiction.

reject it as a valid basis upon which the district court may have assumed jurisdiction. Given the need for certainty as to jurisdiction, we cannot allow plaintiff's subjective intent, ambiguously expressed, to control the issue. There is no reason why trial courts (or appellate courts) should have to resort to close scrutiny of ambiguous memoranda to glean an intent to set forth a monetary claim. In a matter as basic as whether the plaintiff is asking the trial court to award monetary relief, the trial court must be able to answer that question from the plain terms of the complaint. Therefore, we hold that to invoke the Little Tucker Act the plaintiff must demand monetary relief in his complaint or in an amended

complaint.4

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4 At first blush, the strict pleading rule enunciated herein appears inconsistent with the rule that, even if the complaint omits essential jurisdictional averments, the court of appeals (or the Supreme Court) will deem the complaint amended so as to sustain the district court's jurisdiction if the necessary, but omitted, averments affirmatively appear in the record. See Schlesinger v. Councilman, 420 U.S. 738, 744 n. 9, 95 S.Ct. 1300, 1306 n. 9, 43 L.Ed.591 (1975); Norton v. Larney, 266 U.S. 511, 515-16, 45 S.Ct. 145, 147, 69 L.Ed. 413 (1925); see generally 28 U.S.C. 1653 (allowing amendments of defective allegations as to jurisdiction at appellate court level). It must be remembered, however, that this is an exception to the rule that a complaint that does not properly allege the requisite jurisdictional elements is defective, subject to dismissal with leave to amend. See Schlesinger, 420 U.S. at 744 n.9, 95 S.Ct. at 1306 n. 9; Norton, 266 U.S. at 515-16, 45 S.Ct. at 147. The exception is permitted on grounds of judicial economy and to insure that a plaintiff is not denied his day in court on the basis of technical flaws in his pleading. Neither rationale is applicable here.

The judicial economy rationale excuses the absence of a necessary jurisdictional averment because otherwise the lower court proceedings would be for naught; the exception validates the lower court's judgment so that is may be given

As neither the collateral consequences of the prayed for relief nor Wolfe's "waiver" in his memoranda provided a valid basis for invocation of

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effect and properly be heard on appeal. Without the exception there would be, in a technical sense, no proper lower court judgment to review. The district court's judment here needs no such validation. As the district court did not award monetary relief, its judgment is fully supportable by its assertion of jurisdiction over the equitable claims, the only claims made in the pleadings.

Moreover, Wolfe has received a full hearing on his underlying claim--that the discharge was illegal and that the Army Board for Correction of Military Records failed to discharge its mandate to "correct an error or remove an injustice," 10 U.S.C. 1552(a) (1982), when it refused to upgrade the discharge--in both the district court and in this court. Obviously, consideration of this substantive claim need not, and in this case did not, encompass consideration of a distinct claim for monetary damages.

Thus, requiring a plaintiff to demand monetary relief in his complaint to invoke Little Tucker Act jurisdiction will not in any way prejudice a plaintiff. But it will have the benefit of allowing this court to determine easily and definitively whether it has jurisdiction.

jurisdiction under the Little Tucker Act, Wolfe's motion must be denied. This court has twice held that a district court's "subjective" reliance on Little Tucker Act jurisdiction--i.e. invocation of Little Tucker Act without a valid basis--does not require that an appeal proceed to the Federal Circuit. Sharp v. Weinberger, 798 F.2d 1521, 1522 (D.C.Cir.1986); Van Drasek v. Lehman, 762 F.2d 1065, 1068, 1071 (D.C.Cir.1985). Therefore the district court did not have proper Little Tucker Act jurisdiction over the case, and hence this court properly heard the appeal. Appellant's motion is accordingly denied.

It is so Ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARRY W. WOLFE,

Plaintiff,

v. Civil Action No. 85-1073

JOHN O. MARSH, JR. et al.,

Defendants.

DECIDED: December 26, 1985

Before Oberdorfer, U.S. District Court Judge.

MEMORANDUM

Plaintiff, a former serviceman, brings this action to challenge his discharge from the United States Army. Defendants are the Secretary of the Department of the Army, and the United States of America. Plaintiff's complaint charges: (1) that the Army failed to follow its own regulations in effecting plaintiff's discharge, and (2) that defendants acted arbitrarily, capriciously, and contrary to the law when they refused to correct plaintiff's military records pursuant to he request.

Plaintiff's discharge occurred because of his alleged involvement in drug transactions while assigned to Fort Belvoir, Virginia, as an Army cook. Pursuant to an investigation by the Army Criminal Investigation Command (CID),

plaintiff was charged with violations of section 92 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 892, 934, and faced court-martial charges. During the preliminary proceedings, plaintiff was represented by a certified military lawyer, Captain William P. Boyer. Boyer attempted to obtain immunity for plaintiff, but was unsuccessful. Plaintiff then decided to attempt to get a so-called "Chapter 10" discharge (for the good of service) in lieu of a court-martial. Plaintiff submitted his request for discharge in July, 1979. The form requesting such a discharge contains provisions which state that plaintiff: made his request voluntarily, was guilty of the charges against him, had no desire to perform further military service, had consulted with an attorney and received advice, and understood that the discharge

could be under other than honorable conditions.

Later in July, the Army approved plaintiff's request, and discharged him under other than honorable conditions. Plaintiff sought relief from the Army Discharge Review Board, which denied him relief. The Review Board acknowledged administrative errors in his case, but concluded that they were not prejudicial. On January 10, 1983, plaintiff applied to the Army Board for Correction of Military Records (Correction Board) requesting an upgrade from an other than honorable to an honorable discharge. Plaintiff's allegation before the Correction Board was that his discharge should be upgraded because his Official Military Personnel File did not contain a copy of the charge sheet or the required chain-of-command endorsements on plaintiff's Chapter 10

request. The Correction Board also refused plaintiff's request for relief. This action is now before the Court on Defendants' Motion to Dismiss Or, in the Alternative, For Judgment of Affirmance (filed July 17, 1985) and plaintiff's cross-motion for summary judgment (filed Aug. 23, 1985).

I.

Defendants move to dismiss on the ground that plaintiff has not alleged an adequate jurisdictional base for this Court to review his military discharge. Plaintiff alleges six potential bases of jurisdiction: 28 U.S.C. § 1361, relief in the nature of mandamus; 28 U.S.C. § 1331, federal question jurisdiction; 28 U.S.C. § 1343(3), a civil rights action; 28 U.S.C. § 1346(a)(2), the Tucker Act; 28 U.S.C. §§ 2201, 2202, the Declaratory Judgment Act; and 5 U.S.C. 702, the

Administrative Procedure Act. A review of the legal precedent in this circuit and in others reveals that defendants' challenges to the Court's jurisdiction are without merit.

Federal district courts generally have jurisdiction over suits alleging wrongful discharge for the armed services. Woodard v. Marsh, 658 F.2d 989, 992 (5th Cir.), cert. denied, 455 U.S. 1022 (1981); Mindes v. Seaman, 453 F.2d 197, 198 (5th Cir. 1971); Benvenuti v. Department of Defense, 587 F. Supp. 348, 353-56 (D.D.C. 1984). The Mandamus Act, 28 U.S.C. 1361, gives the district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the plaintiff." This statute confers jurisdiction on a district court over a

suit for declaratory and injunctive relief from a discharge allegedly made in violation of Army regulations. Woodard, supra, 658 F.2d at 922; Jones v. Alexander, 609 F.2d 778, 781 (5th Cir.), cert. denied, 449 U.S. 832 (1980). This principle "is directly applicable to [plaintiff's] claim that the Army failed to follow its own regulations." Woodard, supra, 658 F.2d at 992. Moreover, this Court has jurisdiction over plaintiff's monetary claims under the Tucker Act because plaintiff has expressly waived any claim for damages in excess of $9999.99. Id.; VanderMolen v. Stetson, 571 F.2d 617, 619 n. 2 (D.C.Cir.1977); Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss and in Support of Plaintiff's Cross Motion for Summary Judgment (Plaintiff's Opposition) at 7 (filed Aug.

23, 1985). This Court thus has jurisdiction over plaintiff's entire action.

II.

Because this represents an appeal from the decision of the Correction Board, judicial review is limited to determining whether the Correction Board's decision was arbitrary, capricious, or contrary to law. Benvenuti, supra, 587 F. Supp. at 355. Thus the two counts in plaintiff's complaint merge into a single cause of action.

A.

Plaintiff sets out the primary issue on summary judgment as:

> whether, from the evidence of record, Plaintiff's discharge under other than honorable conditions was consistent with established regulations. Implicit in this review is whether the Army Discharge and

> Review Board . . . committed reversible error when it failed to correct the recognized errors, and whether there were errors or injustices which should have been corrected by the Army Board for Correction of Military Records . . . Plaintiff contends that when all circumstances are considered his discharge was fundamentally unfair.

Plaintiff's Opposition at 9.

Plaintiff argues that the administrative record before the Review Board showed that: (1) his discharge was undated; (2) no charge sheet was in his official file; (3) his request had not been forwarded through military channels with the proper endorsements; and (4) a statement made by plaintiff was no longer in the file. Plaintiff argues that these omissions constitute prejudicial error, and that it was erroneous for the Review Board to conclude, as it did, that these omissions were not prejudicial because if

the regulations had been followed the same result would have been obtained.

Plaintiff argues that it is not merely the fact that the proper papers are not in his file which is prejudicial, but also the fact that the contemplated procedures were not followed. Specifically, plaintiff argues that Army regulations contemplate a review by the chain of command of a discharge request such as his. AR 635-200, ¶ 10-3. There is no evidence, he argues, that this review occurred in his case. Plaintiff claims this omission could have been critical because Army regulations require that a reviewing official consider "the member's potential for rehabilitation and his entire record" before approving a discharge. AR 635-200, ¶ 10-4. A fundamental claim of plaintiff's before the Review Board, the Correction Board,

and now before this Court, is that he was never a part of the drug transaction with which he is charged because he thought he was cooperating with a CID investigator. Affidavit of Barry W. Wolfe (filed Aug. 23, 1985). Plaintiff supports this assertion and an assertion as to his generally recognized good character with the affidavits of two of his Army supervisors. Affidavit of James E. David (filed Aug. 23, 1985); Affidavit of Floyd L. Jackson (filed Aug. 23, 1985). Plaintiff also relies on the complimentary statement of his company commander to argue that it is not clear that the company commander would have recommended acceptance of the Chapter 10 request. Plaintiff thus alleges that a review of his entire record by the chain of command could have altered this discharge decision. Because this

"internal system of checks and balances" was not followed, argues plaintiff, he suffered prejudice. Plaintiff's Opposition at 13.

Plaintiff also argues that the Correction Board failed in its mandate "to correct an error or remove an injustice." 10 U.S.C. § 1552(a). Plaintiff claims that in concluding that the administrative errors in his case were not prejudicial, the Correction Board improperly relied on an opinion of the Office of Judge Advocate General that procedures were properly followed, rather than independently reviewing the record to correct an error or remove an injustice. Plaintiff claims that there is no evidence that "at anytime during the administrative process prior to the discharge, anyone took the time to review Plaintiffs [sic] entire military record

or to make any detemination [sic] whether there was any rehabilitative potential for Plaintiff." Plaintiff's Opposition at 16.

Finally, plaintiff responds to some documents submitted by defendants for the first time as part of this litigation. One document is the charge sheet which was missing from plaintiff's official file. Plaintiff claims this document still contains procedural defects such as: no signature by plaintiff evidencing that he refused trial by summary court-martial, no signature by trial counsel evidencing that the charge sheet was served on the accused, and no indication that plaintiff was informed of his rights with respect to the charges against him. These documents also include the reports of the individuals who investigated plaintiff. Plaintiff argues these

contain internal inconsistencies when compared to the charge sheet. Plaintiff also argues that the Army still has submitted no evidence that plaintiff's discharge request was reviewed as required by the chain of command.

B.

The bulk of defendants' argument addresses the jurisdictional issue which has already been resolved. In opposing plaintiff's motion for summary judgment and moving on their own for a judgment of affirmance, defendants argue essentially that plaintiff must meet a high standard of proof in showing the decisions of the two Boards to be arbitrary or capricious, and this is especially difficult since plaintiff presents no new evidence. All of plaintiff's claims, including those presented here as to procedural error, were heard by both Boards, both of which

found the errors not to be prejudicial.

Defendants argue that the procedural errors in plaintiff's case were not prejudicial because the Army's minimum documentation requirement takes into account the possibility that documents will be lost or missing. AR 640-10. This section provides for preparation of missing documents from other available documents. Defendants also rely on the form signed by plaintiff whereby he requested a military discharge. They claim that the fact that the form recited the charges against plaintiff indicates that the charges were indeed preferred and known to plaintiff, and that because plaintiff stated he did not desire further rehabilitation and did not desire to perform further military service, the discharge was justified. Finally, they emphasize that plaintiff recited that the

decision was his own and that he had consulted counsel in making the decision to sign the form.

Defendants emphasize that there is a presumption of regularity in the handling of a discharge request, citing Reed v. Franke, 297 F.2d 17 (4th Cir. 1961). They argue that plaintiff has failed to offer any evidence to rebut the presumption that chain of command review occurred in his case. And, even if plaintiff could demonstrate such review did not occur, he was not prejudiced because in the form he signed he specifically stated he did not desire rehabilitation or future military service. As to any post-discharge filing requirements, defendants claim they could not possibly be prejudicial.

III.

The question before the Court is not

whether, under the facts on the record, plaintiff was guilty of the drug transaction with which he was charged. Neither is the question whether, pursuant to his Chapter 10 request, plaintiff should have been discharged under less than honorable conditions from the Army. Finally, the question is not whether, under the facts as they now appear, the procedural errors in effecting plaintiff's discharge, which the parties admit to have existed, were prejudicial to plaintiff. Rather, the Court's review is limited to determining whether the decision of the Correction Board, the last Army reviewing authority, that the errors were not prejudicial and thus that plaintiff's discharge terms were proper, was arbitrary, capricious, or contrary to law. If the Correction Board could have found as it did, then its decision must

be upheld.

The Correction Board is authorized to "correct any military record . . . [when] necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a). This authorization is discretionary, providing that the Correction Board may correct a record for such reasons, not that it must. The Correction Board record indicates that it considered the same evidence presented by plaintiff to this Court and found that plaintiff's discharge was proper. Specifically, the Correction Board findings were as follows:

> 1. The Board noted that the file did not contain formal court martial charge sheets, however, they noted that the applicant's request for discharge, which he signed was with appropriate legal counsel, contained the charges and specifications for which he requested a Ch 10 discharge. Thus, the applicant

> acknowledged the charges for which he requested a discharge which meets the requirements of Ch 10, AR 635-200 as verified by the legal comments contained in Part IV, Section E of this Case Report and Directive, therefore, the contention is rejected.
>
> 2. The Board accepts the contention as the charges for which the applicant requested discharge are all drug related.
>
> 3. The Board accepts that the applicant's record of military service up until the incident which led to his separation was outstanding.

Defendant's Exhibit II at 17. The Correction Board specifically dealt with the primary issue pressed by plaintiff before this Court:

> ISSUES: During the Board's deliberations, it was determined that there was an administrative error during the discharge process, in that the applicant's unit commander and intermediate commander's [sic] did not take action on the applicant's Ch 10 request prior to approval by the GCMA. Is this administrative error prejudicial to the applicant?

> FINDINGS: The Board finds that the administrative error noted above was not prejudicial to the applicant. The Board based it's [sic] decision on the fact that the applicant testified that he had met with the GCMA for about one hour to plead his case for characterization of his service prior to the GCMA approving the applicant's request for discharge under Ch 10 and the GCMA's determining a characterization of service. Additionally, the Board concluded that due to the seriousness of the Ch 10 charges that had the unit commander and intermediate commanders been involved in the administrative process, they would have recommended acceptance of the Ch 10 request and recommended the award of an Undesirable Discharge.

Id. Finally, the Correction Board explained its rationale:

> The Board carefully reviewed the applicant's records, his contentions, the exhibits provided with his appeal and during the hearing, and the testimony of the applicant and witnesses, and determined that the discharge was proper and equitable. The Board based this decision on the

seriousness of the charges for which the applicant requested discharge, to wit, the wrongful transfer and sale of drugs. The Board took into consideration the applicant's prior Honorable Discharge, his excellent service during the current enlistment up until the time of the incident which led to his discharge, that he had been promoted to the grade of E5 and was on the promotion list to the grade of E6, and also considered the numerous exhibits provided to the Board indicating his outstanding service and duty performance. The Board also considered the applicant's testimony and those of the witnesses, and also the evidence of record pertaining to the possession, transfer and sale of drugs on several occasions. The Board was not convinced by the applicant's testimony to the extent that it disspelled the written evidence in the record. Therefore, the Board by unanimous vote denied the applicant's appeal. The Board did consider in it's [sic] deliberations the applicant's good post service conduct as evidenced by the exhibits submitted.

Id.

The findings and conclusions by the

Correction Board cannot be said to be arbitrary, capricious or contrary to law. It is true that the Army must follow its own regulations. Dilley v. Alexander, 603 F.2d 914, 920 (D.C. Cir. 1979). It is not true, however, that every claim of deviation warrants intervention by a district court. In Dilley, the Army convened a promotion board which did not contain the proper number of Reserve officers as required by federal statute and the Army regulations adopted pursuant to it. The Correction Board reviewed the error and found that the appellants failed to show that they were harmed by the omission. 603 F.2d at 923. The Court responded:

> [T]hese findings, while laudable perhaps, are either irrelevant or incorrect as a matter of law. Although a desire to eliminate prejudice obviously occasioned enactment of the statute, section 266

> itself does not outlaw anti-Reserve bias. It prescribes a procedural entitlement that no subsequent factual finding by the Army can diminish. . . . Endorsement [of such an ends-justifying-the-means procedure] here would also insulate the Army from meaningful judicial scrutiny, for it would permit the Army to violate its governing statutes at will and then determine for itself whether the violation made any difference.

603 F.2d at 923-34.

But the statute and regulations not followed in Dilley were obviously designed for the benefit of the individual officers. Here, the regulations alleged not to have been followed appear most logically to be for the benefit of the individual officers. Here, the regulations alleged not to have been followed appear most logically to be for the benefit of the Army, allowing it to keep valuable individuals even though they request discharges. In this case,

plaintiff takes the odd position of arguing that the regulations at issue were designed to protect him from himself. That is, despite his unequivocal and voluntary request for a discharge and statements that he did not desire rehabilitation or future military service, the Army was required to review, and possibly deny, his request.

Certainly some of the evidence presented on plaintiff's behalf is compelling. It appears that plaintiff requested a Chapter 10 discharge because of personal exigencies, and thought that an upgrade of his discharge could be routinely obtained. Defendants' Exhibit II at 21, 23. It is also obvious that plaintiff was a good serviceman and a good Army cook. Id. at 56-66. But, the Correction Board, recognizing all these considerations, nevertheless concluded

that the discharge was justified. Moreover, the Army's characterization of "the seriousness of the charge" as a factor in its decision is especially due deference because it is particularly within the descretion of the Army to weigh criminal charges against potential mitigating factors.

In sum, while plaintiff's departure from the Army may appear regrettable, the situation presented is not such that this Court can say the Correction Board acted arbitrarily, capriciously, or contrary to law in failing to correct plaintiff's record. The accompanying Order will grant defendant's motion to affirm and will dismiss plaintiff's complaint.

-s-
UNITED STATES DISTRICT JUDGE

Date: December 26, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARRY W. WOLFE,

Plaintiff,

v. Civil Action No. 85-1073

JOHN O. MARSH, JR., et al.,

Defendants.

DECIDED: September 30, 1986

Before Oberdorfer, U.S. District Court Judge.

MEMORANDUM

Plaintiff moves for reconsideration of the December 26, 1985 Order. The memorandum explaining that Order focussed on the ruling of the Army Discharge Review Board ("ADRB") instead of that of the Army Board for Correction of Military Records ("ABCMR"). Accordingly, the Court has carefully reconsidered the December 26, 1985 Order with the assistance of oral argument and the excellent papers filed by counsel for both parties.

The plaintiff has discovered that although the applicable regulations require a medical examination of a soldier being processed for discharge, plaintiff was not examined until after his request for discharge had been approved. Exhibit A to Plaintiff's Memorandum in Support of Motion for

Reconsideration of Order of Dismissal. He points to evidence of a service-connected back injury. See Defendants Exhibit I at 82, Exhibit II at 29, 132, 135-39, 141-142. He urges that there is a possibility, therefore, that a reviewing officer confronted with the medical report could have granted, or at least considered, a medical discharge for plaintiff. Examination of the Memorandum of Consideration issued by the ABCMR reveals that plaintiff himself argued to the Board that his discharge physical examination revealed an elevated hip which, plaintiff claimed, was causing him back pain so that he should have been discharged for medical reasons. The ABCMR noted, however, that the final physical examination indicated neither an elevated hip nor back pain. The ABCMR found medical records of complaints for

back pain on account of muscle strain, but pointedly noted that other examinations during plaintiff's period of service indicated that he was in good health. Most important, his final examination found him fit for discharge. The ABCMR concluded that its examination of the record, including the post-discharge physical examination, indicated that

> [t]here is no evidence that the applicant suffered from any significant back problems prior to discharge.

This finding is supported by the record. Having recited this and other findings, the ABCMR concluded that plaintiff had failed to submit sufficient evidence "to demonstrate the existence of probable material error or injustice to warrant a formal hearing." Memorandum of Consideration at 6. The Court is not

persuaded that this conclusion of the ABCMR was either arbitrary or capricious. Under the circumstances, it is inconveivable that officers reviewing plaintiff's own application for a discharge would have enchanced the discharge requested by plaintiff into a medical one on the basis of the final medical report.

Plaintiff has also challenged the action below because of the failure to process the application through channels and the absense of the court-martial charge sheet. However, both of these matters were considered and rationally resolved by the ADRB. Moreover, its decision and its rationale were before the ABCMR. Although the ABCMR did not directly discuss these issues, its general endorsement of the ADRB action necessarily reflects its consideration

and decision on the entire record that these errors were harmless. An accompanying Order will reaffirm the Order of December 26, 1985.

-s-
UNITED STATES DISTRICT JUDGE

Date: September 29, 1986

PETITIONER'S NOTE

The decision was signed and dated by Judge Oberdorfer on September 29, 1986. However, the date stamped on the decision by the Clerk of Courts as the date filed is September 30, 1986. For purposes of this Petition, the date September 30, 1986 has been used in all references to this decision.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARRY W. WOLFE

Plaintiff,

v. Civil Action No. 85-1073

JOHN O. MARSH, JR., Secretary of the Army
and THE UNITED STATES OF AMERICA

Defendants.

COMPLAINT FOR REINSTATEMENT
DECLARATION AND OTHER APPROPRIATE RELIEF

JURISDICTION

1. This law arises under the laws of the United States including: 10 U.S.C. 1552, the implementing regulations of the United States Department of the Army. This action is for, among other things, mandatory injunctive relief in the nature of mandamus over which this Court has subject matter jurisdiction pursuant to 28 U.S.C. 1361; and further,

this Court has jurisdiction under 28 U.S.C. sections 1331, 1343(3), 1346(a)(2), 2201, 2202, and 5 U.S.C. 702.

PARTIES

2. Plaintiff is a citizen of the United States, and is a resident of the Commonwealth of Virginia.

3. Defendants are John O. Marsh, Jr., the duly appointed, and qualified Secretary of the United States Department of the Army; and the United States of America. Defendant Marsh is charged by law and regulation with the responsibility for and administration of the Department of the Army, its personnel, and Defendant Marsh is sued in his official capacity only.

STATEMENT OF FACTS

4. From approximately April 1, 1971 until he was discharged from military service on or about July 24, 1979 under other than honorable conditions, Plaintiff served as an enlisted man on active duty in the United States Army.

5. Prior to his discharge in 1979, Plaintiff was stationed at Fort Belvoir, Virginia where he was assigned as a cook. His performance as a cook was excellent; and he was on the promotion list for the rank of E-6.

6. On several occasions during the fall of 1978, Plaintiff was approached by a fellow enlisted serviceman, one Specialist Delgado, who attempted to entice Plaintiff to sell marijuana. Plaintiff refused to cooperate and informed this person he would not

cooperate because he was not involved with drugs in any manner.

7. Later in the fall of 1978, Plaintiff learned through other sources that Specialist Delgado was an under cover agent for the Criminal Investigation Division (CID) and involved with the investigation and surveillance of drug transactions in the 30th Engineer Battalion mess hall where Plaintiff was assigned as a cook.

8. Thereafter, knowing that Specialist Delgado, and another enlisted service man were participating in the investigation and surveillance of drug transactions in his unit, plaintiff agreed to arrange meetings between the investigators and the principal under investigation for the purpose of facilitating a sale of marijuana to them. At no time during any of the meetings

between the investigators and the principal under investigation did the Plaintiff purchase, sell, or receive any benefit as a result of the transactions between the investigators and the principal under investigation.

9. At that time, Plaintiff agreed to introduce the investigators to the targets of the CID investigation, Plaintiff believed he was assisting the CID.

10. Subsequent to these transactions, however, he was contacted by the CID and the Federal Bureau of Investigation who then alleged information against him in order to further coerce his participation to set-up his supervisor in the further transactions involving the sale of heroin. Plaintiff agreed to cooperate in this subsequent set-up but the

investigators failed to consummate a purchase of heroin from the target.

11. Thereafter, and ostensibly because of his involvement in the prior transactions and in lieu of a punitive discharge, Plaintiff was discharged from the service under other than honorable conditions.

12. Although Plaintiff was informed that he was to be charged for involvement in illegal drug transactions, there is no charge sheet in the official file.

13. Plaintiff's discharge from the United States Army is undated.

14. Under the circumstances, and in view of his belief that he was aiding the CID in the investigation of illegal drug activities in his unit, Plaintiff believes his discharge was improper since he was not personally involved with drugs, and his involvement in these

transactions was at the insistence of the CID investigators involved.

15. On or about May 18, 1983, Plaintiff filed an application before the Army Board for Correction of Military Records requesting, among other things; that he be reinstated in the United States Army at the grade of E-6, which, if he had remained on active duty he would have attained.

16. On or about February 29, 1984, Plaintiff's request for correction of military records was denied.

17. In denying this application for correction of military records, defendants failed to follow applicable regulations to the extent the absence of a charge sheet in the official file violates, among other things, paragraphs 10-1a and 10-3(c) of AR 65-200 dated 21 November 1977.

18. In denying this application for correction of military records, defendants failed to follow applicable regulations to the extent the absence of proper authorization and endorsements of the chain of command on the request for discharge does not comply with subparagraph 10-3b of AR 635-200 dated 21 November 1977.

19. In denying this application for correction of military records, Defendants failed to consider the letters of recommendation of Plaintiff submitted at the time of discharge.

20. In denying this application for correction of military records, defendants failed to consider the impact of improper command influence and violations of Plaintiffs rights provided in the Manual for Courts-Martial 1969 (Ren.).

21. Plaintiff has exhausted all intra-service and administrative remedies available to him for relief from his invalid and derogatory discharge.

COUNT I

22. On or about July 24, 1979, defendants improperly followed established regulations with respect to discharging Plaintiff from action duty under less than honorable conditions.

COUNT II

23. On or about February 29, 1984, defendants acted arbitrarily, capriciously, and contrary to law when it refused to correct Plaintiffs military records as requested.

WHEREFORE, Plaintiff respectfully prays that this Court render its judgement and:

(a) declare that Plaintiffs discharge from the United States Army was unlawful and not in accordance with established regulations;

(b) Direct that defendants change Plaintiffs military records to reflect:

(i) reinstatement on active duty;

(ii) award Plaintiff the grade of E-6 to which Plaintiff would have been promoted had he not been unlawfully discharged from active duty; and

(c) grant Plaintiff such other further, alternative, or equitable relief as he may be entitled to receive

including, costs and attorney's fees as may be just and proper.

Respectfully submitted,

-s-
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28 USC 1295(a) provides:

(a) The United States Court of Appeals for the Federal Circuit Court shall have exclusive jurisdiction -

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no

other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title:

(2) of an appeal from a final decision of a district court of the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e) or 1346(f) of this title or under

section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of a executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Claims Court;

(4) of an appeal decision of -

(A) the Board of Patent Appeals and Interferences of the Patent and Trademark Office with respect to patent application and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such

appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;

(B) the Commissioner of Patents and Trademarks or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or

(C) a district court to which a case was directed pursuant to section 145 or 146 of title 35;

(5) of an appeal from a final decision of the United States Court of International Trade;

(6) to review the final

determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States (relating to importation of instruments or apparatus);

(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5; and

(10) of an appeal from a final decision of an agency board of contract

appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1)).

28 USC 1346(A) provides:

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-

revenue laws;

(2) Any civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding

in tort which are subject to section 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-235

In the Supreme Court of the United States

OCTOBER TERM, 1988

BARRY M. WOLFE, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Department of Justice
Washington, D.C. 20530
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Petitioner, who is seeking to upgrade his discharge from the Army, contends that the United States Court of Appeals for the Federal Circuit rather than the United States Court of Appeals for the District of Columbia Circuit had appellate jurisdiction in this case.

1. After an investigation of the sale of illegal drugs at Fort Belvoir, Virginia, the Army filed court-martial charges against petitioner (Pet. App. 3A). Petitioner then requested a "chapter 10 discharge," under which a member of the military admits that he is guilty of charges that authorize a bad conduct or dishonorable discharge, states that he does not wish to remain in the military, and acknowledges that his discharge, if accepted, can be under other than honorable conditions (*id.* at 4A-5A). The officer exercising general court-martial jurisdiction approved the discharge request, and petitioner was discharged under than less honorable conditions (*id.* at 6A).

Petitioner subsequently asked the Army Discharge Review Board to upgrade his discharge to honorable. The Review Board denied his request for an upgrade, as did the Army Board for the Correction of Military Records (Pet. App. 6A-7A), and the district court granted summary judgment to the Army on petitioner's request for judicial review of the Correction Board's decision (*id.* at 43A-73A).

Petitioner appealed to the D.C. Circuit. In its initial decision (Pet. App. 1A-26A), the court of appeals rejected his assertions of procedural irregularities in the initial discharge decision.[1] Petitioner then filed a motion for reconsideration, arguing that the D.C. Circuit lacked appellate jurisdiction. Asserting that the district court's jurisdiction was based in part on the "Little Tucker Act," 28 U.S.C. 1346(a)(2), petitioner argued for the first time that exclusive jurisdiction to review that decision on appeal lay in the United States Court of Appeals for the Federal Circuit under 28 U.S.C. 1295(a)(2). He asked the court to withdraw its opinion and transfer the case to the Federal Circuit. See Pet. App. 28A-29A.

The court of appeals, however, in a lengthy supplemental opinion, denied the motion to transfer (Pet. App. 27A-42A). It based its decision on its earlier ruling in

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[1] Petitioner's main argument on appeal was that the officer who originally decided that his discharge would be less than honorable violated Army regulations by not first obtaining the recommendations of petitioner's intermediate commanders. The court reasoned that the Correction Board did not act in an arbitrary and capricious manner in rejecting that argument, since the deciding officer's failure to obtain recommendations from the lower officers did not affect his legal authority as a decisionmaker, only the sufficiency of the data that he used in his decision (Pet. App. 21A-24A). The court determined that petitioner's other arguments were "plainly without merit" (*id.* at 9A n.3).

Vietnam Veterans of America v. *Secretary of the Navy*, 843 F.2d 528, 533-535 (1988), which it characterized as holding that "where a plaintiff seeking an upgrade neither *seeks* nor is *granted* monetary relief, the mere fact that a government payment of money is an automatic concomitant of the requested relief does not support Little Tucker Act jurisdiction" (Pet. App. 29A (emphasis in original)). The court examined the district court record and concluded that at no time did petitioner make an express request for money damages (*id.* at 29A-33A). The court reasoned that a "bright line rule" (*id.* at 38A) against such implied claims for money damages is necessary because "[t]here is no reason why trial courts (or appellate courts) should have to resort to close scrutiny of ambiguous memoranda to glean an intent to set forth a monetary claim" (*id.* at 39A).

2. While we do not necessarily agree with the D.C. Circuit's determination that it had jurisdiction over the appeal in this case, the technical issue petitioner raises is neither sufficiently important nor the subject of sufficient disagreement among the circuits to warrant a grant of certiorari. Moreover, despite our doubts about the D.C. Circuit's jurisdictional holding, that holding is not so clearly wrong that a summary disposition of the petition would be in order. For those reasons, and because petitioner would not, on the facts of this case, be entitled to benefit even if this Court were to agree with his jurisdictional contention, the petition should be denied.

a. In cases involving the correction of military records, plaintiffs occasionally file suit in district court asking for equitable relief (*e.g.*, reinstatement or a discharge upgrade) but leaving ambiguous the question whether they also seek monetary relief. See, *e.g.*, *Vietnam Veterans of America* v. *Secretary of the Navy*, *supra*; *ben-Shalom* v. *Secretary of the Army*, 807 F.2d 982 (Fed. Cir.

1986). Such ambiguities give rise to difficulties in determining jurisdiction, both at the trial level (where the United States Claims Court rather than a district court has always been thought to have exclusive jurisdiction under 28 U.S.C. 1491 over backpay claims for more than $10,000) and at the appellate level (where the Federal Circuit rather than the regional circuit has exclusive jurisdiction under 28 U.S.C. 1295(a)(2) if the plaintiff's monetary claim was cognizable in district court under the Little Tucker Act).

The federal government, in defending such suits, has heretofore sought to resolve such ambiguities by assuming that a plaintiff, unless he or she expressly waives monetary recovery, is seeking monetary relief whenever such relief would follow naturally from the equitable relief the plaintiff seeks. Thus, in the *Vietnam Veterans* case, we urged the court to hold that the complaint should be read as asserting a monetary claim and that the Federal Circuit had exclusive jurisdiction over the appeal. And, in this case, we filed a memorandum agreeing with petitioner that the Federal Circuit had exclusive jurisdiction over the appeal (see Pet. App. 29A n.1). In both cases, however, the court rejected our argument, and in fact there is no published decision of a court of appeals that accepts that argument in the context of a military correction board case. But cf. *Matthews* v. *United States*, 810 F.2d 109, 113 (6th Cir. 1987). In the absence of a square conflict in the circuits, we have not thought this issue sufficiently important—or the case law sufficiently developed—to ask this Court to address the issue. Nor do we agree with petitioner that the issue is ripe for this Court's consideration in this case.

The approach that the D.C. Circuit has taken to this issue, and applied in this case, is at the opposite extreme from the position we have advocated, but it serves the same objective of resolving ambiguities through predict-

able rules. When it is unclear whether the plaintiff seeks monetary relief, the D.C. Circuit presumes that he or she does not seek such relief unless an unambiguous request has been made. See *Vietnam Veterans*, 843 F.2d at 533-535; Pet. App. 29A. In this case, the court of appeals determined that petitioner had not unambiguously sought monetary relief, and it therefore treated the case as one in which the plaintiff sought equitable relief only (see *id.* at 29A-40A).[2] Although the D.C. Circuit's approach is not the one we have advocated in the past, it does make some sense from the standpoint of judicial economy, and we cannot say that it is so clearly wrong that summary action by this Court would be warranted.[3]

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[2] Petitioner nowhere discusses the theory on which the D.C. Circuit held that it had jurisdiction, so it is difficult to determine the basis of his challenge to that theory. Indeed, petitioner describes this case—quite incorrectly—as one involving an inadvertent "failure of • • • the Court of Appeals • • • to take notice of the jurisdictional issue" (Pet. 13), rather than an extensively reasoned resolution of the jurisdictional issue (Pet. App. 27A-42A). If petitioner means to quarrel with the D.C. Circuit's determination that any request he may have made for monetary relief was ambiguous, then he has raised a fact-bound issue concerning the reading of a particular record that is plainly not of the sort that deserves this Court's review.

[3] By contrast, in *Ballam* v. *United States*, 474 U.S. 1078 (1986), on which petitioner relies (Pet. 13-14), the opinion of the court of appeals stated in its opening paragraph that the district court had jurisdiction under the Little Tucker Act. *Ballam* v. *United States*, 747 F.2d 915, 917 (4th Cir. 1984). There was thus no room for debate in *Ballam* about whether the Federal Circuit had exclusive appellate jurisdiction under 28 U.S.C. 1295(a)(2).

b. Even if the jurisdictional issue that petitioner raises were sufficiently important, controversial, or clear to warrant this Court's attention, and even if this Court were to determine that the Federal Circuit rather than the D.C. Circuit had jurisdiction, it would not follow that petitioner would be entitled to the relief he seeks, namely a transfer to the Federal Circuit. The normal remedy when a court of appeals lacks jurisdiction is dismissal of the appeal—a remedy that obviously would do petitioner no good, since he lost in the district court. An exception to that normal remedy is codified in 28 U.S.C. 1631, which allows transfer to a different court "if it is in the interest of justice." A transfer in this case would not be in the interest of justice.

It was petitioner himself who noticed an appeal to the D.C. Circuit rather than the Federal Circuit. More than a year passed between filing of the notice of appeal and judgment, yet at no time did petitioner call the alleged jurisdictional defect to the attention of the court of appeals. It was not until 13 days after the court rendered its judgment, which was adverse to petitioner, that petitioner raised the jurisdictional issue for the first time. See Pet. 11. Moreover, for the reasons given by the court of appeals (Pet. App. 9A n.3, 11A-25A), petitioner's substantive claims are plainly without merit. Therefore it would accomplish nothing but a waste of judicial resources to force yet another court of appeals to pass on this case. Given the combination of petitioner's dilatoriness and the lack of merit to his substantive claims, it certainly would not be "in the interest of justice" to transfer the case to the Federal Circuit. Rather, if petitioner were to prevail on the

jurisdictional issue, the proper course would be to dismiss petitioner's appeal to the D.C. Circuit and leave the judgment of the district court intact.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1988

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